KESHORE ANUPCHAND METHA & ANOR

v.

ABRAR FINANCE BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S2-22-337-99]
8 NOVEMBER 2002

LANDLORD AND TENANT: *Determination - Contractual tenancy - Defendant vacated premises before expiry of tenancy agreement - Whether plaintiffs may sue for losses arising from unexpired term*

EVIDENCE: *Judicial notice - Legal notification - Whether court can take judicial notice of public policy to consolidate licensed financial institutions - Whether a vesting order could be sufficient proof of the effect of such policy*

CONTRACT: *Frustration - Impossiblity - Defendant without business licence - Whether tenancy agreement automatically ended by way of frustration - Whether defendant blameless for frustrating event*

CONTRACT: *Tenancy agreement - Breach - Party not privy to tenancy agreement - Whether liable for damages*

Pursuant to a tenancy agreement ('agreement') entered into between the plaintiffs and the 1st defendant, the plaintiffs agreed to rent its premises to the 1st defendant for a term of three years. In breach of the agreement, the 1st defendant vacated the premises before the expiry of the said agreement.The plaintiffs subsequently claimed damages from the 1st and 2nd defendants for losses arising from the unexpired term of the agreement. The 1st defendant contended that the agreement was terminated not owing to its own default, but on account of the frustration that flowed from the directive given by Bank Negara Malaysia to merge with the 2nd defendant. The 2nd defendant denied liability whilst relying on two defences, ie an acquisition agreement between the 1st and 2nd defendant and a vesting order dated 26 November 1998 which gave effect to the acquisition agreement.

Four issues of liability arose for determination by this court; whether: (1) the court can take judicial notice of public policy to consolidate the licensed financial institutions; (2) the vesting order dated 26 November 1998 is sufficient proof of the effect of such policy; (3) such policy had caused the termination of the agreement by frustration; (3) the second defendant was liable to the plaintiffs by virtue of the vesting order and the acquisition agreement.

Held:

[1] As a result of the said merging exercise directed by Bank Negara Malaysia, the 1st defendant surrendered its business licence and was unable to continue its business at the premises. Therefore, the court was prepared to take judicial notice of the government's policy in consolidating the local financial institutions in Malaysia through mergers and acquisitions. (pp 50 h-i & 51 a)

[2] The vesting order dated 26 November 1998 was sufficient proof of the effect of the government's policy at consolidating the local financial institutions through mergers and acquisitions. (p 52 b-c)

[3] Bereft of its business licence, the tenancy agreement had automatically come to an end by way of frustration. The 1st defendant was blameless by the occurrence of that frustrating event. (pp 56 a-b & 61 a-b)

[4] The liabilities of the 1st defendant under the tenancy agreement was expressly excluded from the acquisition agreement. Furthermore, the second defendant was not privy to the tenancy agreement. As such, the plaintiff's claims should rightly be directed against the 1st defendant, and not the 2nd defendant. (p 61 d & h)

[First three issues answered in the affirmative. Fourth issue answered in the negative.]

Case(s) referred to:

Bank Bumiputra (M) Bhd v. Mohd Ibrahim Salleh & Ors [2000] 2 CLJ 501 ***(refd)***
Borthwick v. Vickers [1973] RTR 390 ***(refd)***
Chapman v. Kirke [1948] 2 KB 450 ***(refd)***
Commonwealth Shipping Representative v. P & O Branch Service [1923] AC 191 ***(refd)***
Denny Mott & Dickson Ltd v. James B Fraser & Co Ltd [1944] AC 265 ***(refd)***
GF Sharp & Co Ltd v. McMillan [1998] I RLR 632 ***(refd)***
Hirji Mulji v. Cheong Yue Steamship Co Ltd [1926] AC 497 ***(refd)***
Ho Weng Leong v. Ng Kee Chin [1996] 5 MLJ 139 ***(refd)***
Holland v. Jones [1917] 23 CLR 149 ***(refd)***
Ingram v. Percival [1969] 1 QB 548 ***(refd)***
IRC v. Marquess Camden [1915] AC 241 ***(refd)***
Joseph Constantine Steamship Line Ltd v. Imperial Smelting Corp Ltd [1942] AC 154 ***(refd)***
Keane v. Mount Vernon Colliery Co [1933] AC 309 ***(refd)***
Lee Seng Hock v. Fatimah Zain [1996] 4 CLJ 519 ***(refd)***
Maritime National Fish Ltd v. Ocean Trawlers Ltd [1935] AC 524 ***(refd)***
Marquis Camden v. IRC [1914] 1 KB 641 ***(refd)***

McQuaker v. Goddard [1940] 1 KB 687 ***(refd)***
Paal Wilson & Co A/S v. Partenreederei Hannah Blumenthal [1983] 1 AC 854 ***(refd)***
Peart v. Bolckow, Vaughan & Co [1925] 1 KB 399 ***(refd)***
Ramli Zakaria & Ors v. The Government of Malaysia [1983] 1 CLJ 73; [1983] CLJ (Rep) 350 ***(refd)***
Read v. Bishop of Lincoln [1892] AC 644 ***(refd)***
Roberts and Ruthven Ltd v. Hall [1912] 5 BWCC 331 ***(refd)***
Singapore Woodcraft Manufacturing Co (Pte) Ltd v. Mok Ah Sai [1978] 1 LNS 183 ***(refd)***
Southern Finance Co Bhd v. Metro Angkasa Sdn Bhd [2000] 7 MLJ 546 ***(refd)***
Van Omeron v. Dowick [1809] 2 Camp 42 ***(refd)***
Youngmin v. Heath [1974] 1 All ER 461 ***(refd)***

Legislation referred to:
Banking And Financial Institutions Act 1989, ss. 13, 15(1), 49(1)(b), (7), 50(8)
Contracts Act 1950, ss. 57(2), 71

For both the parties - Jadadish Chandra; M/s Arbain Chandra Chew & Assocs
For the 1st defendant - Megat Abdul Munir; M/s Yazli Zain Megat & Murad
For the 2nd defendant - Harjit Singh Sandhu; M/s Raja Eleena Siew Ang & Assocs

Reported by Raja Vishnu Sivarajah

JUDGMENT

Abdul Malik Ishak J:

Facts Of The Case

By way of a tenancy agreement dated 26 September 1997, the plaintiffs as the owners of premises identified as No: 156, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur (hereinafter referred to as the "said premises") let and the first defendant agreed to rent the said premises for a term of three years beginning from 1 September 1997 subject to the terms and conditions of the tenancy agreement which the first defendant had agreed to sign and be bound by it. The terms and conditions of the tenancy agreement between the plaintiffs and the first defendant showed, *inter alia*, that the first defendant had agreed to pay the plaintiffs monthly rentals of the said premises in the following manner:

(i) from 1 September 1997 to 30 August 1998 at the monthly rental of RM50,000 per month;

(ii) from 1 September 1998 to 30 August 1999 at the monthly rental of RM55,000 per month; and

(iii) from 1 September 1999 to 30 August 2000 at the monthly rental of RM60,000 per month.

By cl. 5(f) of the tenancy agreement, it was agreed between the plaintiffs and the first defendant that in the event the first defendant wishes to terminate the tenancy agreement before the expiry of the said agreement, the first defendant is obliged to pay the plaintiffs damages calculated according to the difference between the monthly rental that has to be paid by the first defendant for the unexpired term of the tenancy agreement with the monthly rental received from the new tenant.

The first defendant terminated the tenancy agreement on 31 December 1998. In fact, by letter dated 12 December 1998 which was during the subsistence of the tenancy agreement, the first defendant notified the plaintiffs that "due to our merger exercise with Arab Malaysian Finance Berhad (the second defendant), the above premises will be vacated by 31 December 1998". Accordingly, by that notification, the first defendant vacated the said premises.

Pursuant to the first defendant's premature termination of the tenancy agreement, the plaintiffs re-tenanted the said premises to a company known as Mekar Klasik Sdn Bhd and with that in mind a new tenancy agreement dated 12 December 1999 was executed for a monthly rental of RM30,000 with effect from 1 March 1999.

Pursuant to cl. 5(f) of the tenancy agreement between the plaintiffs and the first defendant dated 26 September 1997, the plaintiffs *vide* their solicitors letter dated 22 February 1999 (see p. 52 of the bundle of documents) addressed to the first defendant proceeded to quantify the plaintiffs' losses at RM620,000 in the following manner:

(a) Loss of rental from 1 January 1999 to 28 February 1999 at the rate of RM55,000 per month	RM110,000
(b) Difference in rental from 1 March 1999 to 31 August 1999, ie, six months at RM25,000 per month (RM55,000 minus RM30,000 per month)	RM150,000
(c) Difference in rental from 1 September 1999 to 31 August 2000, ie, 12 months at RM30,000 per month (RM60,000 minus RM30,000 per month)	RM360,000
Total:	RM620,000

Demands were repeatedly made by the plaintiffs but the first defendant had failed, refused and/or neglected to pay the plaintiffs the amount of the damages as quantified by the plaintiffs to the tune of RM620,000. The plaintiffs through their solicitors Messrs Arbain Chandra Chew & Associates had sent a notice of demand to the first defendant by letter dated 22 February 1999 (see p. 52

of the bundle of documents) but to date the first defendant had failed, refused and/or neglected to pay the said sum or any part thereof.

The first defendant challenged the plaintiffs' averments and its defence was simply on the following lines:

(1) that towards the end of 1997, Bank Negara Malaysia had laid down a new policy that all financial institutions in Malaysia should be consolidated or merged;

(2) that in early 1998, Bank Negara Malaysia had directed the first defendant to merge with another financial institution;

(3) that around March 1998, Bank Negara Malaysia had directed the first defendant to merge either with the second defendant or with other financial institutions;

(4) that the first defendant had appealed to the then minister of finance to allow the first defendant to proceed with its banking business independently without having to merge with another financial institution, but unfortunately the appeal was rejected; and

(5) that the first defendant had no choice but to merge with the second defendant.

The first defendant was categorical when it said that the tenancy agreement was not terminated on account of any default or breach by the first defendant but rather the tenancy agreement was terminated on account of the frustration that flowed from the directive given by Bank Negara Malaysia to merge with the second defendant. In addition to that it was said that the tenancy agreement was void by virtue of s. 57(2) of the Contracts Act 1950.

The first defendant advanced a counterclaim in its defence and that counterclaim revolved on the renovation works that were carried out on the said premises in order to improve the quality, image and standard of the said premises. The renovation works came up to the tune of RM895,505.53 and the breakdown may be stated as follows:

(a)	Preliminaries	…	RM 25,000
(b)	Builders' works	…	RM265,944.53
(c)	Built in furniture	…	RM 47,220
(d)	Loose furniture	…	RM 205,361
(e)	Electrical works	…	RM 74,800

(f) Airconditioning works	…	RM 87,180
(g) PC and provisional sums…		RM 190,000
		RM895,505.53

It was said that the condition and standard of the said premises had become "luxurious, tidy and had indirectly contributed to the increase in the value of the said premises." It was the stand of the first defendant that the plaintiffs should compensate the first defendant since there was an unjust enrichment within the meaning of s. 71 of the Contracts Act 1950. The first defendant too demanded for the return of the sum of RM100,000 as security deposit for the occupation of the said premises.

The second defendant, on the other hand, relied on two lines of defences. The first was in the form of an acquisition agreement dated 12 November 1998 entered between the first defendant and the second defendant wherein the first defendant agreed to sell its assets and transfer its liabilities and the second defendant agreed to acquire the assets and take over the first defendant's liabilities. The second was in the form of a vesting order dated 26 November 1998 as ordered by the High Court of Malaya at Kuala Lumpur in the *ex parte* summons in chambers number D5-24-523-1998 which gave full effect to the acquisition agreement. But the second defendant proceeded further and they say that they did not acquire any liability and obligation of the tenancy agreement pertaining to the said premises. The second defendant said that the tenancy agreement was a scuffle between the plaintiffs and the first defendant only and that the second defendant was not responsible for any losses suffered by the plaintiffs pursuant to the tenancy agreement.

Issues For Determination

The parties were magnanimous and they agreed that the following issues were designated for determination by this court:

(1) Whether the court can take judicial notice of public policy to consolidate the licensed financial institutions in the country?

(2) If the answer to question (1) above is in the affirmative, whether the vesting order dated 26 November 1998 is sufficient proof of the effect of such policy?

(3) Whether such policy has caused the termination of the tenancy agreement by frustration?

(4) Whether the second defendant is liable to the plaintiffs by virtue of the vesting order and the acquisition agreement?

I will now examine the above issues as framed by the parties thereto. I will do so in succession.

The First Issue

The first defendant through its learned counsel in the person of Mr Megat Abdul Munir submitted that the first issue should be answered in the affirmative and he advanced the following arguments.

That around the year 1994, the government had implemented a new policy to reduce the number of financial institutions in the country by merging and consolidating the existing financial institutions amongst themselves. Towards this end, Bank Negara Malaysia had issued a letter by way of a directive to the existing financial institutions and allowing them to merge and consolidate with one another. As far as the defendants were concerned, the vesting order dated 26 November 1998 that was issued by the High Court gave the approval to transfer all the business affairs of the first defendant to the second defendant.

It was because of the government's policy that the financial institutions in Malaysia have been reduced to ten anchor financial institutions and this included the second defendant. It was submitted that the government's policy of consolidating the banking industry by reducing the number of financial institutions in the country must be construed as an act of the state. Indeed these are thought provoking submissions that would stir even the minds of the dullest.

I am asked to take into account the public policy of the government to consolidate the licensed financial institutions in the country and to take judicial notice of the same. The deponent in encl. 33 annexed by way of exh. "MKH 1" several interesting literature that was taken from newspaper reports and a report dated June 1997 entitled "Asia Pacific Report" on "Malaysia" covering wide ranging topics. Of pertinence will be an article by Kwan Choo Tow and there the writer wrote, *inter alia*:

BANKING RATIONALISATION

Few mergers despite government call

The clarion call to banks and financial institutions to merge and consolidate was made by the central bank as early as 1994. Yet in a country where moral suasion has traditionally meant that players follow the central bank, there has been just one banking marriage, one engagement and two others ditched at the altar. The dowry offered by Bank Negara was tier one status if the merged banks could meet its capitalisation and other requirements. In Malaysia's tightly-regulated financial market, where distinctions between commercial banks, merchant banks and finance companies are clear-cut, tier one institutions would have greater leeway.

Tier one banks, for instance, can expand regionally by setting up branch offices, representative offices, subsidiary companies or on joint venture basis. They can also issue negotiable instruments of deposits up to five times their capital base and participate in equity financing, share borrowing and lending activities. To be eligible as a tier one bank, a commercial bank must be well-managed, have shareholders' funds of M$500m by 1995. M$1bn by the end of 1998 and paid-up capital of M$1bn by the end of 2000. Other requirements include meeting the CAMEL (capital, asset, management, earnings and liquidity) ratings.

To reduce the structural barriers between the different types of institutions, Bank Negara abolished the requirement that minimum fee income for merchant banks should be at least 30% of total income. Finance companies which want to continue trading in the interbank market must also increase their shareholders' funds to at least M$350m by January 1, 1998. These measures, said banking analysts, were meant to encourage mergers between financial Institutions and to create a core of about six large universal banks. 'What Bank Negara wants is Malaysian versions of JP Morgan,' said an analyst.

At the end of 1996, Malaysia had 37 commercial banks, 40 finance companies and 12 merchant banks serving a population of 20m people. Of these, 11 commercial banks, three finance companies, and four merchant banks had tier one status. Few of them could compete with international banks when Malaysia's tightly regulated financial markets are opened to foreign competition in the first few years after 2000, said banking analysts.

Although locally incorporated foreign banks currently operate in Malaysia, they are not allowed to open new branches unless a local partner takes on a minimum 51% stake in the bank. For their part, local banks are restricted in the kind of services they can provide and can only expand regionally provided they have the go-ahead from the central bank. Local banks have thus long been protected from foreign competition in Kuala Lumpur's tightly regulated financial markets.

Capital adequacy ratios at Malaysian banks are quite high at around 10% presently, said Jeffrey Tan, manager, financial institutions ratings, at Rating Agency, Malaysia. But in absolute amounts, capitalisations of even the top Malaysian banks have a long way to go to match foreign players.

'If you compare with international banks, the absolute amount of shareholder funds at Malayan Banking (Maybank), the largest bank in Malaysia, may not even come up to the level of big foreign banks,' he said.

A Matter Of Size

Simply put, it is size that matters, said Wong Shih Thin, investment analyst at BZW Capital (Malaysia). 'If you are not large enough, you can't compete in terms of winning more market share, or participating in syndications or project finance. On a more defensive theme, unless you are sufficiently large,

exposure to a large bad loan can hit you quite badly. You need to be adequately capitalised, you need to be adequately provisioned to face higher risks in the region.' He said.

So far, many of Malaysia's banks have thrived on the generous spreads between their cost of funds and their lending rates. The interest margin of commercial banks widened by 18bp to 4.79 % in 1996 as the average lending rate rose 84 bp to 10.12%, compared with the average cost of deposits which rose by 66bp to 5.33%, said Bank Negara in its 1996 annual report. This scenario of high profitability in the lending business is not expected to continue when global players with cheaper cost of funds and greater economies of scale and efficiency are allowed to enter Malaysia's financial market. This makes consolidation vital to the survival of Malaysian banks and financial institutions.

One Down, One To Go

To date, however, there has been just one banking merger, with another in progress: DCB Bank, a unit of Rashid Hussain Berhad, the country's top stockbroking firm, bought a 75% stake in Kwong Yik Bank from Maybank for M$2.16bn (US$857m). The merger is expected to be completed by the end of the year, with the merged bank to be called RHB Bank. The other merger in progress is between Chung Khiaw Bank and United Overseas Bank (Malaysia) Bhd, both Malaysian subsidiaries of Singapore's United Overseas Bank Group. On completion of the merger, United Overseas Bank Malaysia will become the 11th largest bank in terms of loans, deposits and assets, UOB official reportedly said.

Two other recent proposed mergers have failed. The sale of Malaysian Industrial Development Finance Bhd's 51% stake in Oriental Bank to conglomerate Sime Darby fell through early this year. Sime Darby had planned to merge Oriental Bank with its Sime Bank. Analysts said MIDF's sale of Oriental Bank did not materialise because it would have meant the loss of a major revenue-driver.

Another failed takeover in early 1997 was the acquisition of Pacific Bank by Singapore's Overseas Chinese Banking Corp (OCBC) Group. This deal crashed on conflicts in legal, regulatory and accounting issues. Had the merger been successful, it would have created Malaysia's fourth largest local bank, with total assets of M$17bn based on the accounts of the two banks at the end of 1995, said some analysts. 'The Singapore party was to hold a majority stake in the merged entity. That does not go down well with the central bank in the context of rationalisation of Malaysian banks,' said Wong of BZW.

The Kuala Lumpur stock market, meanwhile, is awash with rumours of possible banking tie-ups. Government-controlled Bank Islam was rumoured to be merged with Bank Rakyat, another government-controlled bank. Bank Islam officials have denied this and said that under their restructuring plan announced last year, they will raise capital to try and make it to tier one status on their own. Government-controlled Bank Bumiputra, the second largest

bank in Malaysia with group total assets of M$45.57bn and shareholders funds of M$2.71bn at the end of the financial year finishing March 31 1996, was linked to Bank of Commerce. Analysts said that they expect any sale of a large stake in Bank Bumiputra will take place after it is privatised and listed. This would make it easier to place a price on a Bank Bumiputra stake, they said. Hong Leong Bank, owned by tycoon Quek Leng Chan, is believed to be looking for a bank to acquire. MBf Holdings has denied rumours of a merger with Sabah's Suria Capital. So far, few banking marriages have materialised.

'They can't meet eye to eye on price. The problem is that the value of the banking licence will decline. We are also looking at a more moderate economic environment,' said Wan Ismail, banking analyst at Morgan Stanley. 'There is some downside risk in equity valuation of banks in a more moderate economic environment in the form of more bad assets coming on stream or even poor performance affecting profitability,' he added.

Chris McAllum, the editor of the "Asia Pacific Report" wrote a foreword on Malaysia and this was what he said (see encl. 33 at exh/ "MKH 1"):

With a population of just under 20 million, Malaysia cannot be considered one of the giants in the Asia Pacific region. In terms of nominal GDP, Malaysia's economy is only a little larger than the island state of Singapore, which has a population of 2.9 million. But the government of Malaysia, under Prime Minister Mahathir Mohammad, is pursuing ambitious goals and instituting economic policies which are prodding Malaysia towards economic liberalisation.

Malaysia's economy grew by 8.8% in 1996, the second highest growth rate in the Asia Pacific region behind China. The recent economic woes in Thailand if anything emphasised the comparatively robust nature of the Malaysian economy, aided by a more flexible exchange rate policy and low external debt.

Hand in hand with achieving the goal of sustainable economic growth, the nurturing fingers of the government are felt in nearly all aspects of the economy and financial system. Alarmed by the risks associated with assert inflation, the central bank, Bank Negara, restricted banks from extending more than 20% of their loan portfolios to the property sector. The impending glut of commercial real estate however, will tell if this measure was effective.

Bank Negara also keeps tight rein on Malaysian borrowers tapping the international capital markets. Permission to raise funds overseas is usually restricted to funds to be used to finance overseas investments or big ticket imports. However, in recognition of the importance of the international capital markets the Government continues to develop its offshore banking centre in Labuan. Allowing Malaysian corporates to establish operations in the offshore centre and changes in withholding tax regulations are the most recent steps in enhancing the viability of the island centre.

a In recognition of the need for the Malaysian financial system to consolidate in order to compete in a deregulated environment, Bank Negara has instituted new capital requirements and is actively encouraging mergers. But in an economic upswing with corresponding strong loan growth, it appears that more than moral suasion is needed to spur consolidation.

b The outlook for the equity markets is less certain. Newly instituted regulations restricting lending to fund stock purchases spooked the market. The almost immediate about-turn on a number of these restrictions brought short-term relief, but reinforced concerns over excessive asset inflation. In addition, the market has to contend with up to M$35bn for new issuance this year.

c Developing the Islamic financing sector is a priority for the government. In this area, it appears as if the government is pushing the sector far ahead of market forces, instead of being dictated by them. A lack of avenues to invest Islamic deposits and compatibility issues with other Islamic financial systems have up until now inhibited the sector.

d The central bank has imposed prudent guidelines on the derivatives markets. It is ensuring that banks comply to guidelines based on G30 recommendations before they can offer corporates derivative products. However, in a highly regulated and stable market many corporates do not understand the need for risk management products. To date, only one domestic bank, Arab-Malaysia Merchant Bank, has met the grade to make markets in derivatives.

e Issuance is expected to double this year in the country's fledging domestic bond markets. There is already a relatively active market in corporate paper, fuelled almost entirely by bonds detached from warrants. But both the issuance and investor sides of the equation remain heavily regulated, making it difficult for the market to sustain momentum.

f Most economists agree that the benevolent hand of the Malaysian regulator has successfully laid the groundwork for a vibrant economy and the makings of a sound financial system. The three goals of ensuring that the domestic financial system is internationally competitive before deregulation, developing a domestic bond market and the prudent introduction of derivatives products

g have met with widespread approval.

The test is yet to come. Rationalisation of financial systems usually occurs in periods of distress or due to the immediate need to become competitive. The understanding of the value of derivative products normally comes hand in hand with periods of market volatility. It is during these conditions that Malaysian

h regulators resolve to promote not only a competitive financial system, but also a deregulated financial system, will be tested.

Not to be left out, the "Star" newspaper in its Friday issue dated 13 November 1998 carried the following write-ups (see encl. 33 at exh. "MKH1"):

i AMFB in deal to buy certain assets of Abrar Finance

ARAB-MALAYSIAN Finance Bhd (AMFB) has signed a sales and purchase agreement with Abrar Group International Sdn Bhd to acquire certain assets and liabilities of Abrar Finance Bhd.

A statement from AMFB yesterday said the acquisition had been approved by Bank Negara, the Ministry of Finance and the Foreign Investment Committee, and was expected to be completed by year end.

'It would give AMFB an added presence in Islamic banking with Abrar's existing customer base,' the statement said.

'This is in line with AMFB's long-term business development and expansion plan to build up its Islamic banking services and at the same time to heed the government's call to promote Islamic banking.'

In addition, the proposed acquisition would enable AMFB to consolidate its resources and operations to enhance long-term earnings and profitability.

The statement said that with the acquisition, Abrar's existing customers would be able to enjoy wide range of products and services as well as AMFB's extended banking hours and Sunday banking at selected branches.

Abrar's depositors in future would be able to perform banking transactions at all AMFB branches nationwide. Its customers with loan accounts would also be able to execute their loan transactions at selected AMFB branches.

This acquisition, according to the statement, is not expected to have any material effect on the financial results of AMFB or AMMB Holdings Bhd for the financial year ending March 31, 1999.

AMFB has been identified by Bank Negara as one of the anchor finance companies in the consolidation of the financial services industry.

AMFB has total assets of RM18.6bil and shareholders' funds (including irredeemable convertible unsecured loan stocks) of RM1.6bil as at March 31, 1998.

Abrar Finance is the only full-fledged Islamic finance company that provides a full range of syariah-based financial products.

Based on all these interesting write-ups, I was asked to take judicial notice of the fact that the local financial institutions in Malaysia have been consolidated through mergers and acquisitions and that the first defendant was also directed by Bank Negara Malaysia to merge and consolidate with the second defendant pursuant to the government's policy.

The scope of judicial notice can never be closed. To enable a judge to educate himself so that he can take judicial notice of a fact, the judge may consult appropriate sources. I am doing just that by educating myself on the write-ups

as found in exh. "MKH1" of encl. 33. There are numerous authorities on this point and I need to quote some of them in succession:

(1) *Commonwealth Shipping Representative v. P & O Branch Service* [1923] AC 191 at 212, HL per Lord Sumner;

(2) *McQuaker v. Goddard* [1940] 1 KB 687, [1940] 1 All ER 471, CA;

(3) *Read v. Bishop of Lincoln* [1892] AC 644, PC;

(4) *Marquis Camden v. IRC* [1914] 1 KB 641, CA;

(5) *IRC v. Marquess Camden* [1915] AC 241, HL; and

(6) *Chapman v. Kirke* [1948] 2 KB 450 at 454, [1948] 2 All ER 556 at 557.

In order to take judicial notice of a fact, the judge may even hear evidence (*Van Omeron v. Dowick* [1809] 2 Camp 42). The judge may even act upon his own general knowledge of the local affairs in order to take judicial notice of the same (*Roberts and Ruthven Ltd v. Hall* [1912] 5 BWCC 331 at 333, CA; *Peart v. Bolckow, Vaughan & Co* [1925] 1 KB 399 at 409, 419, 420, CA; *Keane v. Mount Vernon Colliery Co* [1933] AC 309 at 317, 337, HL; *Youngmin v. Heath* [1974] 1 All ER 461 at 464, [1974] 1 WLR 135 at 138, CA per Roskill LJ; *Ingram v. Percival* [1969] 1 QB 548, [1968] 3 All ER 657; and *Borthwick v. Vickers* [1973] RTR 390 at 394, per Lord Widgery CJ).

Critics scorn at the doctrine of judicial notice. While the pragmatists hail the doctrine of judicial notice and advocate its use to the fullest. As I see it, the doctrine of judicial notice would, when applied wisely, expedite the hearing of many cases. A lot of judicial time will be wasted if every fact which was not admitted had to be proved – in many instances this would be a costly affair and extremely difficult to obtain. It is also because of the need to establish a uniformity of decision on matters of fact that the doctrine of judicial notice has been vigorously applied. According to Isaacs CJ in *Holland v. Jones* [1917] 23 CLR 149 at 153, that the basic essential to note is that the fact judicially noticed should be of a certain class that is generally known so as to give rise to the presumption that all persons are aware of it.

Now, in pursuance of the government's policy, Bank Negara Malaysia had issued the directive to the first defendant to merge and consolidate with the second defendant and this resulted in the first defendant surrendering its business licence to Bank Negara Malaysia. Bereft of its business licence, the first defendant was unable to continue its business at the said premises. And so it can be surmised that the government's policy had rendered the first defendant's business defunct. It had ceased to exist. I am certainly prepared to take judicial

notice of the Malaysian government's policy in consolidating the local financial institutions in Malaysia through mergers and acquisitions. The merger of the first defendant with that of the second defendant was certainly aimed at consolidation. Other financial institutions in the country followed suit. I need not name these other financial institutions. The write-ups in exh. "MKH1" of encl. 33 speak volumes. Incidentally, the court in *Southern Finance Co Bhd v. Metro Angkasa Sdn Bhd* [2000] 7 MLJ 546 recognised the consolidation of the banking industry.

On judicial notice, I had this to say in *Bank Bumiputra (M) Bhd v. Mohd Ibrahim bin Salleh* & Ors [2000] 2 CLJ 501, especially at p. 521 to p. 522 of the report:

> I take judicial notice of the frequency of power failures in the Johor Bahru High Courts. The scope and latitude of judicial notice extend far and wide. It is not closed. When a court takes judicial notice of a fact it simply means that the court declares that it will find that the fact exists. Lord Sumner in *Commonwealth Shipping Representative v. P & O Branch Service* [1923] AC 191 at p 212 aptly said, in fine style, the following:
>
> > Judicial notice refers to facts which a judge can be called upon to receive and to act upon either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer.
>
> The list of cases where the courts have taken judicial notice of facts without inquiry are endless and examples of them can readily be found in the law books. I will now endeavour to cite a few examples:
>
> (1) No evidence is required to show that a fortnight is too short a period for human gestation (*R v. Luffe* [1807] 8 East 193).
>
> (2) That the University of Oxford exists for the advancement of learning (*Re Oxford Poor Rate Case* [1857] 8 E & B 184).
>
> (3) That cats are normally kept as domestic animals (*Nye v. Niblett* [1918] 1 KB 23).
>
> (4) That young boys have playful habits and tendencies (*Clayton v. Hardwicke Colliery Co Ltd* [1915] 85 LJKB 292).
>
> (5) That criminals have an unusually unhappy lives (*Burns v. Edman* [1970] 2 QB 541, [1970] 1 All ER 886).
>
> (6) A post card sent through the mail will be read by everyone and by anyone (*Huth v. Huth* [1915] 3 KB 32).
>
> (7) That husbands will read their wives' letters (*Theaker v. Richardson* [1962] 1 All ER 229, [1962] 1 WLR 151).

> Now, applying my general knowledge of the courts in Johor Bahru, handwritten notations would be done by the relevant officers when electricity supplies were not available. This was what had happened to encl 24a. Power shortages in the Johor Bahru High Courts are quite common and it happened with alarming frequency.

I would, for the above reasons, answer the first issue in the affirmative.

The Second Issue

I would certainly hold that the vesting order dated 26 November 1998 is sufficient proof of the effect of the government's policy at consolidating the local financial institutions through mergers and acquisitions. Here, it was because of the government's policy that the second defendant had taken over the business affairs of the first defendant. But there was no necessity for the second defendant to continue doing business at the said premises. That merger simply meant that the first defendant was out of commission and its licence had been surrendered to Bank Negara Malaysia.

But the learned counsel for the plaintiffs argued that pursuant to the vesting order dated 26 November 1998, the second defendant had purchased the business of the first defendant and that by virtue of cl. 2(e) of the vesting order the second defendant must be construed to have taken over the role of the first defendant and must therefore be held to be a party to the tenancy agreement with the plaintiffs. This meant, so the learned counsel for the plaintiffs submitted, that the second defendant must be held accountable to the plaintiffs under the tenancy agreement.

A submission was made on behalf of the plaintiffs that the vesting order dated 26 November 1998 was made pursuant to s. 50 of the Banking And Financial Institutions Act 1989 (Act 372) ("BAFIA 1989"), and I was urged to consider that section. My attention was also drawn to s. 49(1)(b) of BAFIA 1989 and that section enacts as follows (the relevant ones only):

> 49. Sanction required for reconstruction, etc. of licensed institutions.
>
> (1) No person shall enter into an agreement or arrangement:
>
> (b) for the sale, disposal, or transfer howsoever, of the whole or any part of the business of a licensed institution.

and it continues in this way:

> unless:
>
> (B) all the parties thereto have first made an application in writing to the Minister for his approval of such agreement or arrangement and have obtained the Minister's approval thereto.

Emphasis was then laid on the word "business" and that word has been defined in s. 50(8) of BAFIA 1989 as follows:

> (8) For the purposes of this section:
>
> 'business' means any activity carried on for the purpose of gain or profit and includes all property derived from, or used in or for the purpose of, carrying on such activity and all rights and liabilities arising from such activity.

Flowing from that it was argued that the plaintiffs' solicitors had, by letter dated 18 November 1998 (see exh. "KAM4" of encl. 28), written to Bank Negara Malaysia enquiring whether approval had been granted to the second defendant to purchase the assets and liabilities of the first defendant and if so, whether the liability as set forth in the tenancy agreement was part of the sale and purchase agreement. By letter dated 26 November 1998 as seen in exh. "KAM4" of encl. 28, Bank Negara Malaysia replied and it stated that approval had been given to the second defendant to obtain the business of the first defendant and that the issue of the tenancy agreement of the said premises should be forwarded straight to the first defendant or the second defendant. In its original text, the letter from Bank Negara Malaysia dated 26 November 1998 as seen in exh. "KAM4" of encl. 28 was worded in this way:

> Tuan,
>
> Perjanjian Penyewaan Premis No. 156, Jalan Tuanku Abdul Rahman, Kuala Lumpur oleh Abrar Finance Berhad
>
> Kami merujuk surat tuan kepada Gabenor Bank Negara Malaysia bertarikh 18 November 1998 mengenai perkara di atas.
>
> 2. Adalah dimaklumkan bahawa Arab-Malaysian Finance Berhad (AMFB) telah diberi kelulusan untuk memperolehi perniagaan syarikat kewangan Abrar Finance Berhad (Abrar). Persoalan yang dibangkitkan oleh anak guaman tuan berhubung sewaan premis yang diduduki oleh Abrar itu seharusnya dikemukakan terus kepada Abrar atau AMFB.

It was therefore clear as crystal that Bank Negara Malaysia was unable to determine the issue of the tenancy agreement of the said premises after the merger of the first defendant with the second defendant. It must, however, be emphasised that pursuant to the letter dated 29 July 1998 as seen in exh. "MKH2" of encl. 33, Bank Negara Malaysia had given its consent to the second defendant to merge or consolidate their banking business with the first defendant in compliance with the government's policy. That letter was worded in its original text in these terms (see exh. "MKH2" of encl. 33):

BANK NEGARA MALAYSIA

29 Julai 1998

Encik Mohamed Azmi Mahmood
Pengarah Urusan
Arab-Malaysian Finance Berhad
Tingkat 10, Bangunan Arab-Malaysian
No. 55, Jalan Raja Chulan
50200 Kuala Lumpur

Tuan,

Cadangan Pengambilalihan Abrar Finance Berhad Oleh Arab-Malaysian Finance Berhad

Kami merujuk surat tuan bertarikh 13 Julai 1998 mengenai perkara di atas.

2. Kami ingin memaklumkan bahawa Yang Amat Berhormat Menteri Kewangan telah memberi kelulusan menurut Seksyen 49(7) Akta Bank dan Institusi-Institusi Kewangan 1989 untuk membenarkan Arab-Malaysian Finance Berhad (ArabFin) dan Abrar Finance Berhad (Abrar) membuat perjanjian atau perkiraan untuk menjual, melupus atau memindahkan, bagaimana jua cara sekalipun, akan keseluruhan atau mana-mana bahagian perniagaan Abrar kepada ArabFin. Sehubungan ini, lesen Abrar hendaklah diserahkan kepada Bank Negara Malaysia untuk pembatalan setelah proses pengambilalihan tersebut selesai.

Sekian.

Yang benar
Sgd (Illegible).
(Mohd Razif Abdul Kadir)
Pengarah
Jabatan Pengawalan Bank

s.k. Encik Mohd Khalil Hussain
Pengarah Urusan/Ketua Pegawai Eksekutif
Abrar Finance Berhad
156 Jalan Tuanku Abdul Rahman
50100 Kuala Lumpur

Subsequently, the acquisition agreement was signed by both the defendants and a vesting order was then issued by the court dated 26 November 1998. As demonstrated, pursuant to the government's policy and the decision of Bank Negara Malaysia, the financial institutions in Malaysia have been reduced to only ten anchor financial institutions which included the second defendant. In making that decision, Bank Negara Malaysia must have acted under s. 49(7) of BAFIA 1989 which enacts as follows:

(7) Upon receiving an application and the recommendation of the Bank under this section, the Minister may approve the application with or without any modifications, variations or conditions, or refuse the application.

Once the minister had approved the application it would then be a directive decision against the financial institution.

Flowing from all these, it was therefore part and parcel of my judgment that the vesting order dated 26 November 1998 is sufficient proof of the effect of the Malaysian government's policy in regard to the consolidation of the licensed financial institutions in the country and this court would certainly give effect to that vesting order. Accordingly, I would answer the second issue in the affirmative.

The Third Issue

It was rightly submitted by the learned counsel for the first defendant that the Malaysian government's policy to merge and consolidate the local financial institutions had indirectly caused the termination of the tenancy agreement between the plaintiffs and the first defendant thus rendering the tenancy agreement to be frustrated. This was the only logical conclusion to be arrived at. The direction to merge both the defendants would mean that the first defendant had to surrender its finance licence to Bank Negara Malaysia. This would greatly curtail the life span, so to speak, of the first defendant. The merger would mean that the first defendant had no legal standing or authority to operate its finance company's business and it must, by law, cease to operate its finance company's business. This in turn would render the tenancy agreement frustrated because the first defendant could not operate its finance company's business at the said premises by virtue of the fact that it had surrendered its finance company's licence to Bank Negara Malaysia through no fault of its own.

Now, cl. 7.1(d) of the acquisition agreement, styled as the "agreement for the acquisition of finance company business" and as seen in exh. "KAM3" of encl. 28, states as follows:

7.1 Seller's Warranties

(d) The Seller is solvent, able to pay its debts and has not suspended or threatened to suspend to make payment of any of its debts due. It has not convened any meeting of its creditors or proposed or made any arrangement or composition with, or any assignment for the benefit of, its creditors. There is no petition presented or meeting convened for the purpose of considering a resolution or other steps are taken for making an administration order against or for winding up of the Seller. No receiver, administrative receiver or managers has been appointed in respect of any of its assets or undertakings.

and it shows that the first defendant was a stable finance company, solvent and able to pay its debts but because of the government's policy and the directive from Bank Negara Malaysia, the first defendant's business had to cease. It was not a self induced frustration. This was part and parcel of my judgment. Furthermore, with the surrendering of its finance company's licence the first defendant by its very name had no legal standing, in law, to operate the finance company at the said premises. Bereft of its licence, the first defendant was a toothless tiger. Frustration had set in and the tenancy agreement must die a natural death. Section 13 of BAFIA 1989 enacts as follows:

> 13. Prohibition on carrying on of licensed business upon revocation, expiry of duration or surrender of licence.
>
> Where the revocation of a licence granted under section 6(4) has taken effect, or a restriction on its duration under section 8 has expired, or its surrender under section 12 has taken effect, the institution to which the licence was granted shall immediately thereupon cease to carry on any business in respect of which the licence was granted:
>
> Provided that where the institution continues to exist as a corporation after the revocation has taken effect the Minister may, on the recommendation of the Bank, authorise the institution in writing to carry on such activity for such duration as the Minister may specify in the authorisation for the purpose of winding-up its affairs or for purposes which are beneficial to its depositors, other customers or creditors.

and when properly construed it would definitely be of assistance to the first defendant. Section 15(1) of BAFIA, 1989 would shackle the first defendant further where it enacts as follows:

> 15. Restriction on use of word 'bank', etc.
>
> (1) Except with the written consent of the Minister:
>
> (a) no person, not being a licensed institution, shall assume or use the words 'bank', 'deposit-taking company', 'finance company', 'merchant bank', 'discount house', 'money-broker', or 'foreign exchange broker', as the case may be, or any derivatives of these words in any language, or any other words in any language capable of being construed as indicating the carrying on of such business, in relation to the business or any part of the business carried on by the person, or make any representation to such effect in any bill head, letter paper, notice, advertisement, or in any other manner whatsoever.

The sum total of it all would be this. That frustration had set in.

Incidentally, s. 57(2) of the Contracts Act 1950 explains the doctrine of frustration in this way:

> Contract to do act afterwards becoming impossible or unlawful.
>
> (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

On frustration, the then Federal Court in *Ramli bin Zakaria & 85 Ors v. The Government of Malaysia* [1983] 1 CLJ 73 at p. 76; [1983] CLJ (Rep) 350, at pp. 355, 356, had this to say:

> The introductory passage in a chapter dealing with discharge by frustration in '*The Law of Contract in Malaysia and Singapore – Cases and Commentary*' by Visu Sinnadurai at p. 487/8 reads:
>
> > A contract is frustrated when there is a change in the circumstances which renders a contract legally or physically impossible of performance. According to the House of Lords in the case of *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corpn. Ltd.* [1942] AC 154, the doctrine 'is only a special case of the discharge of contracts by an impossibility of performance arising after the contract was made'. Section 57(2) of the Contracts Act 1950 states the doctrine thus:
> >
> > > A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
> >
> > The Act does not define the word 'impossible'. However, it appears that the wording of the section envisages two main instances of frustration – when a contract to do an act becomes (a) impossible or (b) unlawful. It is clear that the frustration should be supervening and subsequent to the formation of the contract. Furthermore, it should be some event which the promisor could not prevent, as a 'self-induced frustration' does not discharge a party of his contractual obligation. *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.* [1935] AC 524.
>
> With reference to the present case, the question is whether the change in the salary scale rendered performance impossible. Before answering the question we would refer to the English law with regard to the proper test of frustration. The law on this point is succinctly set out in '*Chitty on Contracts – General Principles*' 24th Edn., p. 658/9 as follows:
>
> > In view of the decision of the House of Lords in *Davis Contractors Ltd. v. Fareham UDC* [1956] the proper test for frustration may be formulated as follows: If the literal words of the contract were to be enforced in the changed circumstances, would this involve fundamental

or radical change from the obligation originally undertaken? In this case Lord Radcliffe said:

> … frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do … There must be … such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for [1956] AC 696, 729.

Lord Reid put the test for frustration in a similar way. 'The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end'. (*Ibid* at p. 721). Later in his speech, (*Ibid* at p. 723) he approved the words of Asquith LJ that the question is whether the events alleged to frustrate the contract were 'fundamental enough to transmute the job the contractor had undertaken into a job of a different kind, which the contract did not contemplate and to which it could not apply.' *Parkinson (Sir Lindsay) & Co. Ltd. v. Commissioners of Works* [1949] 2 KB 632, 667.

It would seem that the question is one of construction of the contract and in this regard we again refer to *'Chitty on Contracts'*, same edition at p. 659/60 where it is stated:

> Both Lord Reid and Radcliffe emphasised that the first step was to construe 'the terms which are in the contract read in the light of the nature of the contract, and of the relevant surrounding circumstances when the contract was made', [1956] AC 696, 720 – 721 (per Lord Reid). From this construction the Court should reach an impression of the scope of the original obligation, that is, the Court should ascertain what the parties would be required to do in order to fulfil their literal promises in the original circumstances. This impression will depend on the Court's estimate of what performance would have required in time, labour, money and materials, if there had been no change in the circumstances existing at the time the contract was made. The court should then examine the situation existing after the occurrence of the event alleged to have frustrated the contract, and ascertain what would be the obligation of the parties if the words of the contract were enforced in the new circumstances. Having discovered what was the original 'obligation' and what would be the new 'obligation' if the contract were still binding in the new circumstances, the last step in the process is for the Court to compare the two obligations in order to decide whether the new obligation is a 'radical' or 'fundamental', change from the original obligation, Per Lord Reid, in *Tsakiroglou &*

> *Co. Ltd. v. Noblee Thorl GmbH*, [1962] AC 93 at p. 118. It is not simply a question whether there has been a radical change in the circumstances, but whether there has been a radical change in the 'obligation' or the actual effect of the promises of the parties construed in the light of the new circumstances. Was 'performance … fundamentally different in a commercial sense'? (*Ibid* at p. 119).
>
> Their Lordships also agreed that it is a matter of law [1956] AC 696, 723 for the Court to construe the contract in the light of the facts existing at its formation and then 'to determine whether the ultimate situation … is or is not within the scope of the contract so construed', [1956] AC 696, 721. It is submitted that the House of Lords has accepted the view that the test for frustration is objective [1956] AC at p. 728 and that frustration is a matter of positive judicial intervention. It is not a subjective inquiry into the actual or presumed intention of the parties, as was suggested by the older theory of the implied term, since the discharge of a contract on the ground of frustration occurs automatically upon the happening of the frustrating event, and does not depend upon any repudiation or other act of volition on the part of either party.
>
> In short it would appear that where after a contract has been entered into there is a change of circumstances but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the performance of the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration.

And these passages were quoted favourably by the Court of Appeal in *Lee Seng Hock v. Fatimah Zain* [1996] 4 CLJ 519. The issue of frustration was also considered in the case of *Singapore Woodcraft Manufacturing Co. (Pte) Ltd v. Mok Ah Sai* [1978] 1 LNS 183. In *Ho Weng Leong v. Ng Kee Chin* [1996] 5 MLJ 139, I examined the law of frustration in a nutshell and there I said at p. 149 to p. 150:

> It is abundantly clear from the available evidence and it is my judgment that because of the failure of the defendant to obtain the necessary conversion, the tenancy agreement became impossible to perform and it has not, at all, been performed. It is now trite law that a contract is said to be frustrated when there is a change in the circumstances which renders a contract legally or physically impossible of performance. The House of Lords in the case of *Joseph Constantine Steamship Line Ltd v. Imperial Smelting Corporation Ltd* [1942] AC 154 stated that the doctrine of frustration, is only a special case of the discharge of contracts by an impossibility of performance arising after the contract was made.' The doctrine of frustration has since found its way into the statute book. Section 57(2) of the Contracts Act 1950 states the doctrine in this fashion:

> A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Unfortunately the Contracts Act 1950 does not define the word 'impossible'. But what is clear is that the frustration should be supervening and subsequent to the formation of the contract. It must relate to some event which the promisor could not prevent from happening. However, a 'self-induced frustration' does not discharge a party of his contractual obligations: *Maritime National Fish Ltd v. Ocean Trawlers Ltd* [1935] AC 524 as applied by the then Federal Court in *Ramli bin Zakaria & Ors v. Government of Malaysia* [1982] 2 MLJ 257. It is clear that when a contract is discharged by frustration, the contract is said to have come to an end: *Hirji Mulji & Ors v. Cheong Yue Steamship Co Ltd* [1926] AC 497 as cited in the local case of *Berney v. Tronoh Mines Ltd* [1949] MLJ 4. Section 57(1) of the Contracts Act 1950 enacts that: 'An agreement to do an act impossible in itself is void.' Section 57(2) of the Contracts Act 1950 too states that such a contract 'become void'. At common law, the effect of frustration would be to release the parties to a contract of any future obligations but leaving intact any legal rights already accrued or money paid: *Chandler v. Webster* [1904] 1 KB 493; *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32; and *Kung Swee Heng & Anor v. Paritam Kaur* [1948] MLJ 170. Restitutionary remedies are also provided under ss. 57(3) and 66 of the Contracts Act 1950. See *Govindram Seksaria & Anor v. Edward Radbone* [1947] IA 285; *Murugesan v. Krishnasamy & Anor* [1958] MLJ 92 and *Menaka v. Lum Kum Chum* [1977] 1 MLJ 91. In the final analysis in order to determine the effect of frustration, one must take stock of the intention of the parties as construed from terms of the contract itself without having to go elsewhere (*Chan Buck Kia v. Naga Shipping & Trading Co Ltd* [1963] MLJ 159). On reflection, I cannot help but feel constrained to say that the doctrine of frustration is exhaustively covered by the Contracts Act 1950 and the need to refer to the common law may be minimal and drastically reduced in the future. Be that as it may, since the tenancy agreement in the present case is void, and I so hold it to be so, the plaintiff is entitled to recover back RM158,000 from the defendant forthwith. The defendant is bound under s. 66 of the Contracts Act 1950 to restore that sum to the plaintiff and I so make that order accordingly.

Frustration is an interesting branch of the law on contract. It is said that frustration brings an end to a contract "forthwith, without more and automatically" (*Hirji Mulji v. Cheong Yue Steamship Co Ltd* [1926] AC 497, 505; *Maritime National Fish Ltd v. Ocean Trawlers Ltd* [1935] AC 524, 527; *Joseph Constantine Steamship Line Ltd v. Imperial Smelting Corp Ltd* [1942] AC 154, 163, 170, 171, 187, 200; *Denny Mott & Dickson Ltd v. James B Fraser & Co Ltd* [1944] AC 265, 274; and *GF Sharp & Co Ltd v. McMillan* [1998] I RLR 632). It is also said that a frustrating event must take place "without blame or fault on the side of the party seeking to rely on it" (*Paal*

Wilson & Co A/S v. Partenreederei Hannah Blumenthal [1983] 1 AC 854, 882, 909). With alacrity, I must say that the tenancy agreement had automatically come to an end by way of frustration and that the first defendant was totally blameless by the occurrence of that frustrating event.

On the facts, frustration had set in and the first defendant's obligation under the tenancy agreement had automatically ended. I was asked to hold that the plaintiffs were under an obligation to refund the deposit to the first defendant in the sum of RM100,000 as pleaded in the counterclaim, which was a necessary corollary, but I declined to do so as I felt that the matter should be handled by the senior assistant registrar.

I would, for the above reasons, answer the third issue in the affirmative.

The Fourth Issue

I would answer this issue in the negative.

The liabilities of the first defendant arising from or under the tenancy agreement entered between the plaintiffs and the first defendant have been expressly excluded from the acquisition exercise entered into between the first defendant and the second defendant. That this is so can clearly be seen in the acquisition agreement itself.

Under the acquisition agreement both the defendants have agreed that the following would be expressly excluded from the term "liabilities":

(i) all liabilities of the first defendant for income tax;

(ii) any liability or obligation of the first defendant which is not set out in sch. 3 of the acquisition agreement; and

(iii) all liabilities or obligations of the first defendant arising from or under the tenancy agreements entered into by the first defendant in respect of the three business premises.

In the context of the present case, one of the three business premises would be the said premises in question. Thus, it can be surmised that the liability of the first defendant under the tenancy agreement was expressly excluded from the acquisition agreement.

In addition to the above, it would be correct to say that the second defendant was not privy to the tenancy agreement. That being the case, the plaintiffs' claims should rightly be directed against the first defendant in personam. Flowing from that I was asked to hold that the plaintiffs' claims against the second defendant for damages should be dismissed with costs, which was also a necessary corollary, but I declined to do so as I felt that it was within the domain of the senior assistant registrar to act accordingly.

Conclusion

This judgment must be restricted to the issue of liability and I was only concerned with that all pervasive issue.

I regard to the four issues for determination as framed by the parties, I must answer them in this way. That the first three issues must be answered in the affirmative. As for the fourth issue, I would answer it in the negative.